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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER and WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 694.

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER and WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW.

Your respondent is not satisfied with the statement contained in the petition for writ of certiorari (pp. 2; 3)* setting forth the questions presented for review by this Court.

* Page references contained herein and preceded by the letter "p" designate pages in petitioners' Petitions for Writ of Certiorari.

Respondent submits that question number 1 of the petition is not properly before the Court for consideration. The question has to do with a city ordinance separate and apart from the ordinance under which petitioners were charged below. No ordinance fitting the description of the one referred to in question number 2, having to do with segregation in eating facilities, was ever injected into the trial below, either by pleadings or by proof, or by any identification whatever.

Question number 2, having to do with whether Negroes may be excluded from eating areas in stores while being served elsewhere in the stores, involves no constitutional or federal question, unless the petitioners' question be predicated upon the state or its agency exercising the privilege of exclusion on the premises.

Question number 3, which is hypothecated on the supposition that petitioners were "convicted of trespass for seeking nonsegregated food service at white-only dining areas", completely evades the **trespass ordinance** under which the petitioners were in fact charged and convicted.

The question further asserts the "convictions" were upon "records barren of evidence that any person making the requests to leave identified his authority to make the requests".

The question of whether the person making the request to leave **identify** his authority to do so is one involving purely the scope a state or local law as to whether the identification is required, and is not a federal question.

Question number 4, which petitioners present for review, dealing with the assumed failure of the managers to phone the police and demand prosecution, does not present a constitutional or federal question, but seeks only a review of local procedural law.

STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case does not involve Section 369 (1944) of the General City Code of Birmingham, as proposed in Petition for Writ (pp. 3, 4).

This section of the city code is here raised for the **first time**, has not been a matter for review in any of the state courts, and therefore is not properly includable in the petition as an ordinance for consideration by the court.

STATEMENT IN OPPOSITION TO JURISDICTION OF THE COURT.

I.

Counsel for petitioners has failed to notify the respondent or respondent's counsel of record, either on a form supplied by the Clerk of the Court or otherwise, of the date of filing of the petition for certiorari in this case, or of the docket number of the case, or of the filing of the record with the Court as required by supreme court rules. **Supreme Court Rule 21 (1)**, 28 U. S. C. A., **Supreme Court Rule 33 (1)**, 28 U. S. C. A.

II.

That petitioners have not been deprived of rights, privileges, or immunities secured by the Constitution of the United States.

III.

If, in fact, there be any jurisdiction in this Court in this cause, it is confined to the state appellate courts' rulings on assignments of errors 3 and 4, having to do with mo-

tions to exclude the evidence and motions for new trial, respectively, both of which motions were identical in language in each case below, except with reference to designating the respective stores involved.

Assignments of error 1 and 2, having to do with the overruling by the court of first instance of motions to strike the complaints and demurrers to the complaints, were decided upon adequate and independent state grounds as opposed to federal grounds.

STATEMENT.

As set forth in petitioners' statement (p. 5), the petitioners were all convicted below for having trespassed after warning in violation of a city code provision (Sec. 1436).

While a great portion of the record in each of the cases is consumed with details concerning the respective petitioners going upon the premises of the various department stores, the gravamen of the offense charged in each instance was that the petitioners remained on the premises described in the respective complaints after being warned not to do so.

Gober and Davis:

City witness Gottlinger, Controller for Pizitz Department Store, testified he heard the assistant to the president of the store, while conversing with the two petitioners, Gober and Davis, ask the petitioners to leave the tea room and told them they could be served in the Negro restaurant in the basement (Gober 20, Davis 22); that the petitioners did not leave, but remained until the officers arrived (ibid).

Police Officer Pearce testified (Gober 39, Davis 40), with reference to a conversation he had with Davis and Gober

the day following their arrest, "they (the petitioners) said they were instructed to go into the store and sit down at a white lunch counter, and that they would probably be or would be asked to leave, and not to leave but to remain there until the police arrested them and took them out".

Police Officer Martin (Gober 17-18, Davis 18-19) was told by a superior officer to go to Pizitz Store because of a disturbance there. Upon arrival at Pizitz Store, there were people in the store talking to his superior officers, and he was ordered by his immediate superior to make the arrest.

The petitioners (Davis 43-44, Gober 44-45) did not bother to ask the identity of the person who told them to leave.

Hutchison and King:

Petitioners' statement asserts that "the only disturbance, however, was that '. . . the waiters left the floor' ".

The record (King 28, Hutchison 28) shows a commotion was started by all the white patrons "getting up and leaving the area" when the Negroes were seated.

On three occasions the store detective announced within three feet of the petitioners that the place was closed and asked that the people move, in addition to hanging up a sign stating the place was closed (Hutchison 26, King 26).

Parker and West:

Mrs. Gibbs, store detective at Newberry's (Parker 21; West 18), identified herself to the petitioners and "told them they would have to leave", and testified that petitioners "said they were not going to leave" (ibid).

Mr. Stallings, assistant store manager (Parker 23, West 20), told the petitioners, "You know you can't do this"; that petitioners "kept sitting there and said, 'We have our rights'" (ibid).

Mrs. Gibbs further informed the petitioners (Parker 21, West 18) that they could be served on the fourth floor, and on cross-examination stated that only colored people were served on the fourth floor (Parker 22, West 19).

Sanders and Westmoreland:

In this instance, the petitioners concede in their statement (p. 11) that it was testified that "the manager asked the petitioners to leave the store" (Sanders 20 Westmoreland 17). Petitioners then state that on cross-examination (p. 11) the witness, who was manager of the luncheon counter, explained he had reference only to leaving "that section" and that the store was not mentioned.

This latter assertion of petitioners is incorrect and out of context. The witness was asked, ". . . what was the statement Mr. Braswell (store manager) made to these two boys in your presence?" (Sanders 20, Westmoreland 17). The answer was "He asked them to leave the store" (ibid). On cross-examination the witness (lunch counter manager) was asked what he (the witness) told the boys. He stated he asked them to leave "that section". No part of the cross-examination at any time referred to the statement of the store manager demanding that the petitioners leave the store.

However, this matter seems only academic and abstract, since the complaints filed by respondent dealt specifically with petitioners' remaining "on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building . . .", designating each respective building (Sanders 2, Westmoreland 2).

Walker and Willis:

Mrs. Evans, manager of the luncheon counter at Woolworth, told the boys to leave, that the place was closed, and that she would not serve them (Walker 18, Willis 15). When the officer arrived, the lights over the luncheon counter were turned out and, "Mrs. Evans was there waiting for the officer" (Walker 17, Willis 14).

Mrs. Evans told the officer that she wanted them out of the store, though on cross-examination the words "luncheon counter" were substituted for the word "store".

FACTS IN COMMON.

Respondent takes this occasion to avail itself of the privilege of supplying certain corrections and additions to the petitioners' statement under the above topical heading.

While the evidence, as stated by petitioners, does not in fact show that any of the officials of the various department stores stated specifically to any of the petitioners that their official positions and capacities with the respective stores carried specific authority, in writing or otherwise, to order persons off the premises, neither is it shown anywhere in the record that any of the store officials lacked such authority. In no instance did the petitioners ask for any credentials from the persons ordering them to leave, nor did any petitioner, as revealed by the record question in any manner the authority of the respective officials to speak on behalf of the property owners.

While the record does not disclose who reported the behavior of the petitioners in the various stores involved, to the police, the record is conspicuously absent of any attempt on the part of petitioners to question any police official or police records concerning the matter of who, in fact, reported the incidents to the police.

Petitioners' conclusion that the management of the various stores was prohibited by an existing city ordinance to serve Negroes was in no way raised by the pleadings in the trial court, nor is the ordinance anywhere set out in the record. No reference whatever was made to any such ordinance by way of assignment of error in the state appellate court.

The record shows no mention of any such ordinance was ever made at the time of the arrest of the respective petitioners, or at any time thereafter.

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

Respondent wishes to call the Court's attention to certain inaccuracies in petitioners' statement under the above topical heading (pp. 14, 15) and to supply certain additions thereto as follows:

1. The motions to strike the complaint below did **not** contain the following ground as asserted by petitioners, namely, "that section 1436 (city code) denied due process of law secured by the 14th amendment in that it was unconstitutionally vague **by not requiring that the person making the demand to depart identify his authority.**" (Emphasis supplied.)

2. No mention of the words "identify" or "authority", or words vaguely resembling same, are to be found anywhere in the motions to strike, each of which motions is found on page 2 of the respective records.

Petitioners make the same assertion as to grounds contained in their **demurrers.** Again, no such language is anywhere to be found in any of the grounds for the demurrers, which demurrers appear on pages 3 and 4 of the respective records.

3. **The motions to strike and the demurrers** were overruled on independent state grounds rather than on any federal questions, as shown by opinion of state appellate court copied into the petition for writ (pp. 6a, 7a).

4. No motion to exclude the evidence is shown by the record in the case of Roosevel Westmoreland, consequently, such a motion was not before the state courts.

5. None of the written motions to exclude the evidence in the court below, which were all in identical language, sought any relief. No prayer for any action on the part of the lower court was inserted in the motion. The motion to exclude the evidence moved for no action or relief from the court. The motions were, in fact, simply a documentation of supposed law and fact, and the court below had nothing before it upon which to afford any relief to the petitioners.

ARGUMENT.

Re: Lack of Jurisdiction of the Court.

Respondent insists the Court is without jurisdiction to entertain the "petition for writ of certiorari" in this cause, for that the petition was not served upon either of the counsel of record for respondent, namely, Watts E. Davis or Bill Walker, later referred to as William C. Walker, whose names clearly appear upon the face of the title pages appearing in each of the respective records now before the Court in this cause as the only counsel of record.

The **Gober** case below is reported in 133 So. 2d 697. The other nine petitioners' cases below immediately follow **Gober** and are reported in sequence. Each of these published decisions, both in the Court of Appeals and the Supreme Court, shows "Watts E. Davis and William C. Walker for Appellee."

The proof of service, Form 75 (8-61-10M), as supplied by the Clerk and subsequently filed with the Clerk of this

Court, demonstrates clearly that notice of the filing of the petition, the record and proceedings and opinion of the Court of Appeals of Alabama and of the Supreme Court of Alabama, was served upon "Hon. MacDonald Gallion, Mr. James M. Breckenridge." Service of the notice, which is required by **Supreme Court Rule 21 (1)**, 28 U. S. C. A.,[1] to be made as required by **Supreme Court Rule 33 (1)**, 28 U. S. C. A.,[2] was attempted to be accomplished by use of the mail. **Supreme Court Rule 33 (1)**, 28 U. S. C. A., requires that **service by mail shall be addressed to counsel of record** (emphasis supplied) at his post office address, which, as shown *supra*, was not done in this case.

It is your respondent's position that the petitioners' failure to comply with the reasonable rules of this Court in the above regard, whether done through carelessness or indifference to the rules of this Court, leaves the respondent without notice of the proceedings pending in this cause, as required by law, and that the Court is without jurisdiction to proceed without the necessary parties to the writ before the Court, and that the petition for writ seeking certiorari should be dismissed or denied.

The rules of this Court, **Supreme Court Rule 24 (2)**,[3] 28 U. S. C. A., do not provide for a separate motion to

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[1] The pertinent provision of Supreme Court Rule 21 (1) reads, "Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition. . . ."

[2] The pertinent provision of *Supreme Court Rule* 33 reads, "Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. . . ."

[3] "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

dismiss a petition for writ of certiorari upon any grounds, and absent the remedy of any such motion, respondent prays that nothing contained in its reply brief shall be considered as a waiver of its question presented here to the jurisdiction of the Court.

ARGUMENT.

Re: Questions Presented for Review.

I.

Petitioners ask in their petition (p-2, paragraph 1) a determination of whether due process was denied them when they were arrested and convicted for a trespass, for failure to leave a dining area, where their exclusion was allegedly required by some other ordinance ordering "segregation in eating facilities".

The ordinance referred to by petitioners, allegedly requiring segregation in eating establishments, is cited as appearing in the General City Code of Birmingham, in Section 369 (1944).

This question has not heretofore been injected into the case, either by pleadings or by proof below, or by assignment of error or argument before the appellate courts of Alabama. The record will disclose that no identity of any such ordinance was ever suggested in the trial court, nor was any request made to the court to take judicial notice of any such ordinance. The complaint filed against the petitioners in the court of first instance was attacked by lengthy pleadings, none of which put in issue the existence of any such ordinance. The respondent was never afforded any opportunity or right of reply or challenge to same, or even the right to dispute same. As in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering the opinion of the Court, stated: "There

is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything."

The trial de novo in the County circuit court below, although quasi criminal, is tried as are other civil actions, and complaints are amendable as in civil actions. **Campbell v. Jackson**, 257 Ala. 618, 60 So. 2d 252.

Code of Alabama, Title 7, section 225, says in part as follows: "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, **must plead specially the matter of defense**". (Emphasis supplied.)

Assuming the existence of such an ordinance, petitioners did not seek to avail themselves of its benefits in any court below, and cannot avail themselves in this Court of some remedy not sought in the state courts. Such a constitutional question as might be raised by the consideration now of the ordinance must be dealt with only as it is appropriately raised upon the record before this Court. **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri**, 805 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373.

It should be noted that **civil** rules of appeal govern appeals from a conviction for violating a city ordinance to a state appellate court in Alabama, as noted in the opinion below in this case, and as copied into the petition for writ (p-5a), which opinion below cites numerous Alabama decisions in support of the rule and states: "Accordingly, we will limit our review to errors assigned and argued in appellants' (petitioners') brief."

The only function which judicial notice can serve is to dispense with **proof**, and **it cannot serve to dispense with pleadings**, as substantiated by the fact the rules relating to judicial notice are rules of evidence rather than rules of

pleadings. Since the alleged ordinance was not pleaded in the trial court and appears nowhere in the record before the state appellate courts, it is not appropriate to now raise the subject for the first time in this Court.

II.

Petitioners' second question sought to be reviewed by this Court, poses the question of whether due process is denied when one is convicted of trespass for refusal to leave a whites-only dining area in a store, where he is served without discrimination elsewhere in the store.

This identical question is argued by petitioners (p. 23-27) under the topical heading of Reasons for Granting the Writ (p. 18), and respondent directs its argument here both to the question and to the argument in support of petitioners' reason for granting the writ.

The argument of petitioners is basically encompassed within the statements that, "We have here, therefore, the state racially rearranging by means of a trespass ordinance the customers within a single store" (p. 23); and, "That private property may be involved hardly settles a claim that Fourteenth Amendment rights have been denied" (p. 24).

The Civil Rights Cases, 109 U. S. 3; 3 S. Ct. 18, 27 L. Ed. 835, should clearly answer both contentions of the petitioners, in stating: "Individual invasion of individual rights is not the subject matter of the (Fourteenth) Amendment."

The trespass ordinance complained of by petitioners does no more, nor no less, than afford a right to an individual to warn persons to leave his premises for whatever purpose he may desire. If his warning is regarded by others as infringing upon their rights, their remedy is not in the

Fourteenth Amendment to the Constitution. The ordinance is simply a codification of a property right already afforded the property owners by the Fourteenth Amendment, and affords a simple and expeditious manner of enforcing this right. This Court aptly stated in **Martin v. Struthers**, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313, that, "Traditionally, the American law punishes those who enter onto the property of another after having been warned to keep off".

Mr. Justice Douglas emphasized in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961) that, "So far as the Fourteenth Amendment is concerned, individuals can be as prejudiced and intolerant as they like."

The trespass ordinance might well be the subject of attack if it were available only for the protection of the property of one race or another, but petitioners do not urge that Negroes are not entitled to the availability of the benefits of the ordinance. Simply, petitioners say it should not be used by whites against members of the colored race; or perhaps vice versa.

As to rearranging a store racially by application of the ordinance, it appears to the respondent that this may be done, whether by prejudice or otherwise on the part of the store owner. **Garner, supra.** This proposition finds further support in **Browder v. Gayle**, 142 F. Supp. 707.

The department stores, while paying a license tax, were privately owned as opposed to being publicly owned or financed by public funds. The state appellate court held the stores to be "a private business—a private enterprise" (p. 10a).

III.

Petitioners seek review of question 3 (p. 3), which, in substance, asks whether due process was denied where

the record was "barren of any evidence that any person making the request to leave identified his authority to make the request".

The question presented is **not** whether the persons ordering the petitioners to leave **actually had such authority**, but, as stated in lead paragraph III of petition (p. 27) in a corollary statement of the question, whether the failure of the ordinance "to specify that petitioners should have obeyed commands to depart given by persons who did not establish authority to issue such orders at the time given", denied petitioners due process of law.

Petitioners are simply arguing that the ordinance should contain an additional provision requiring the person making the order to leave identify his authority to make such order, and that the failure of the ordinance to so provide is violative of due process.

Such an argument, in effect, implies that the ordinance should provide a means whereby an arsonist, vandalist or trespasser must be confronted with a deed to the property, and that the validity of the deed must be substantiated before the ordinance could be free itself of a denial of due process, or in absence of a deed, to spell out the authority for the command in some other fashion satisfactory to the trespasser or intruder.

The wisdom of adding such a provision to the trespass ordinance is certainly open to grave question, but the question of wisdom, propriety, or desirability is one for the legislative body of this city to concern itself with, and not one for this Court.

"The principle that of all the powers of local government the police power is one of the least limitable is deep in our law . . ." **Lambert v. People of State of California,** Cal. 1957, 78 S. Ct. 240, 355 U. S. 255, 2 L. Ed. 2d 228,

rehearing denied 78 S. Ct. 410, 355 U. S. 937, 2 L. Ed. 2d 419.

"Once a subject is found to be within scope of state's police power the only limitations upon exercise of that power are that regulations must have reference in fact to welfare of society and must be fairly designed to protect the public against evils which might otherwise occur, and within these limits legislature is sole judge of nature and extent of measures necessary to accomplish its purpose." **Gilbert v. Mathews**, 1960, 352 P. 2d 58, 186 Kan. 672.

The question of whether the legislative body of the city should have placed additional restrictions upon property owners in safeguarding their property against trespassers, as urged by petitioners, is not properly a question for this Court, and has so been decided many times. Such principle was affirmed in the following language in the case of **Standard Oil Co. v. City of Marysville, Kan.**, 1929, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856, rehearing denied 50 S. Ct. 79, motion denied 51 S. Ct. 38, 282 U. S. 797, 75 L. Ed. 718, wherein it was stated, "Where legislative action is within scope of the police power, **fairly debatable questions** (emphasis supplied) as to its reasonableness, wisdom and propriety are not for the determination of courts but for that of the legislative body on which rests the duty and responsibility of decision."

Petitioners also argue that a scienter requirement should have been laid down in the ordinance. This, too, is the province of the legislative body, and has so been ruled by this Court, and in the Alabama Supreme Court. **Smith v. State**, 136 So. 270, 271, 223 Ala. 346, states, "The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal char-

acter are immaterial circumstances on the question of guilt. Whether or not in a given case a statute is to be so construed is to be determined by the court by considering the subject matter of the prohibition as well as the **language of the statute** (emphasis supplied), and thus ascertaining the intention of the legislature."

Petitioners argue that the trespass ordinance gives no fair warning of its "harshness" (p. 28). In light of the fact that petitioners in some instances suggested calling the police, refused to leave when afforded an opportunity to leave, and insisted on their rights to remain, this argument seems little more than spurious.

Of more importance in considering petitioners' question for review number 3, is the question of how it was asserted in the state court. Ground number 5 of the motions to exclude the evidence, which were filed in only some of the cases below (Gober 5, Davis 5, Hutchison 5, King 5, Parker 5, Sanders 5, Walker 5), did in different terms raise the question. Only at this point is it raised.

However, in Alabama it is held, "The rule that in respect to a motion to exclude all of the plaintiff's evidence in a civil case, is that the trial court will not be put in error for refusing the motion, nor will it be put in error for granting it if the evidence does not make out a prima facie case. **Dudley Brothers Lumber Co. v. Long**, 109 So. 2d 684, 268 Ala. 565. In other words, under Alabama decisions a motion to exclude the evidence is **not reviewable** by the appellate court. The **affirmative charge** is the only way to make it reviewable. **Mazer v. Brown**, 66 So. 2d 563, 259 Ala. 449.

IV.

Question number 4, presented by petitioners (p. 3) and argued under Reasons for Granting the Writ (pp. 30-34), is whether freedom of expression was denied petitioners where, as petitioners allege, the managers did not call the police or demand prosecution "and were apparently willing to endure the controversy without recourse to criminal process".

Petitioners refer to Mr. Justice Harlan's concurring opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), in which there was found a protected area of free expression on private property on facts regarded as involving "the implied consent of management . . .". Respondent is in full accord with this recent affirmance of established law. Mr. Justice Harlan, in the foregoing opinion, affirmed also, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in Briscoe) just as it would not encompass verbal expression in a private home if the owner has not consented".

For one reason or another, it appears from the petitioners' argument that if a **demonstration** is involved, the case for free speech becomes stronger. Whatever may be the significance of the word **demonstration**, the facts in these cases do not indicate to your respondent that demonstrations were involved in these cases.

According to the records, certain things were common in each of the cases. None of the petitioners carried placards or handbills. None of the petitioners made or attempted to make speeches. No one resisted arrest in any manner so as to attract attention. None of the usual fanfare of photographers and newspaper people were in attendance as is customary for demonstrations. One of the

petitioners (Gober 19, Davis 20) suggested that the police be called, indicating that his extended presence on the premises was not of importance. One of the petitioners (Gober 42, Davis 43) stated the nature of his business was to "shop", and that he purchased socks, toothpaste, and a handkerchief (ibid). He stated further he was there for "a snack" (Gober 48, Davis 49). Another of the petitioners (West 26, Parker 25) stated he purchased comic books and paper. He further testified (ibid) that he said to Parker, "Let's go over here and get something to eat."

The only inference your respondent can fairly draw from the behavior of the petitioners in the stores is that their mission was to provoke an arrest and not to stage anything in the nature of a demonstration. The fact that only two students were involved in each store lends further credence to this conclusion. Under the facts as presented in the records, it would appear that the petitioners were accorded everything they sought in each of the stores, and that their right to precipitate litigation was in no way impeded nor denied them, but quite to the contrary. It must be assumed, and it is not denied, that the plans of the petitioners proceeded as they expected them to.

It is difficult for your respondent to see wherein the matter of free speech was in any way involved in the incidents which took place in the various stores. Assuming, however, that your respondent is in error in this regard, this Court's recent expression through Mr. Justice Harlan in **Garner**, supra, would deny petitioners Fourteenth Amendment protection while demonstrating on the private property of another after being told to leave.

The fact that the store owners may have maintained separate eating facilities for Negroes out of prejudice or racial intolerance is of no legal significance. As Mr. Justice Douglas wrote in **Garner v. Louisiana**, supra, "So far

as the Fourteenth Amendment is concerned, individuals can be as prejudicial and intolerant as they like."

Much of petitioners' argument is directed to the manner in which the police made the arrest. Evidently, the petitioners are under the impression that witnesses to a crime or punishable offense are to blind themselves to what they see and make no report to law enforcement officers. As often as not, the victim is preoccupied and hardly in a position to make a timely report to the police.

In either event, however, the record is silent as to who in fact made the report to the police department, other than the testimony that a store detective was waiting for the police in one instance, Newberry Store (Parker 23, West 20), and at another, an officer made an arrest after his superior officers discussed the matter with people in the store and he was ordered to make the arrest (Gober 17-18, Davis 18-19).

Petitioners made no attempt, as shown by the record, to avail themselves of any of the records kept in the police department of complaints made by phone, nor does the record disclose that they attempted to get the information as to the source of the complaint by interrogating any of the officials of the police department on the subject in the trial below.

Where an offense has been committed, as in these instances, where the petitioners had been told to leave the dining area and they refused, it is not essentially the problem of the store owners to establish law enforcement policy for the City. After the intruders were told by the owners or their agents to leave and the owners were confronted with defiance and refusal of their order, an offense had been committed, punishable under the city code, and the question of then entering upon a "social and economic give and take" between the store owner and the offender would necessarily be pre-empted.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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